Supreme Court, U. S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

NO. 79-1411

ROBERT BUSHONG ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARKANSAS

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Robert Bushong, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas entered on November 13, 1979, and the Per Curiam Order of the Supreme Court of Arkansas, entered on December 17, 1979, denying Petitioner's application for rehearing.

OPINIONS BELOW

The opinion of the court below affirming petitioner's conviction is unreported and is reproduced in Appendix "A" to this Petition.

Petitioner's petition for rehearing and memorandum in support thereof is reproduced in Appendix "B" to this Petition.

The Per Curiam Order of the court below denying Petitioner's application for rehearing is unreported and reproduced in Appendix "C" to this Petition.

The Per Curiam Order of the Supreme Court of Arkansas granting a recall of the appellate mandate pending disposition of this Petition is reproduced in Appendix "D".

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on November 13, 1979. The Per Curiam Order of the Supreme Court of Arkansas denying Petitioner's application for rehearing was entered on December 17, 1979. A recall of the mandate staying execution of judgment pending disposition for his Petition for Certiorari was entered by the Arkansas Supreme Court on January 28, 1980.

This Petition for Certiorari was filed less than ninety (90) days from the date of the denial of Petitioner's application for rehearing in the court below. The jurisdiction of this Court is invoked under 28 U.S C. §1257(3).

QUESTIONS PRESENTED

I.

If none of the four statutory criteria for placing a substance in Schedule VI applied to marijuana, (which is in Schedule VI), did the enforcement of that criminal statute deny Petitioner a fair trial implicit in the Fourteenth Amendment to the United States Constitution?

II.

Was Petitioner denied a fair trial implicit in the

Fourteenth Amendment by the introduction of Petitioner's inculpatory statements where the State failed to call all material witnesses present during Petitioner's interrogations and further, that such inculpatory statements were induced by coercion, violence and threats of harm?

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Section 1, Amendment 14 to the Constitution of the United States in pertinent part: . . . No State shall make and enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner was charged under Ark. Stat. Ann. §82-2614.2 a statute of the Controlled Substances Act, which classified marijuana as a Schedule VI substance. The criteria for placing a substance within Schedule VI, as enumerated in Ark. Stat. Ann. §82-2614.1, are as follows:

(a) The substance is not currently accepted for medical use in treatment in the United States;

(b) That there is lack of accepted safety for use of the drug or other substance even under direct medical supervision;

(c) That the substance has relatively high psychological and/or physiological dependence liability; and,

(d) That the use of the substance presents a definite risk to public health.

STATEMENT OF THE CASE

Petitioner, Robert Bushong, was convicted of possession of marijuana with intent to deliver in Izard County Circuit Court, Arkansas. During a pre-trial hearing on motion to suppress any admission or confession, Petitioner testified that his inculpatory statements were given as a result of coercion, violence and threats of harm (R. 300). Another police officer, Lloyd Martz testified at the pre-trial hearing that a police officer, Doug Rogers, was present when the acts of violence and coercion occurred (R. 403). Doug Rogers did not appear to give testimony at either the pre-trial hearing or at the trial. Petitioner did not testify at trial.

At a pre-trial hearing to dismiss the criminal information charging Petitioner with possession of marijuana with intent to deliver, Petitioner presented exhausted testimony from Dr. Herbert Modlin, a psychiatrist from the Menninger Foundation in Topeka, Kansas. Dr. Modlin testified that the overwhelming weight of authority clearly indicates that the classification of marijuana within Schedule VI of the Arkansas Controlled Substances Act is erroneous (R. 182-234).

On appeal to the Supreme Court of Arkansas, Petitioner argued Arkansas' Controlled Substances Act relative to marijuana was arbitrary, capricious and erroneous and therefore denied the Petitioner due process of law and equal protection of the laws in violation of the Fourteenth Amendment.

Petitioner further argued on appeal to the Arkansas Supreme Court that the Circuit Court erred in failing to

suppress Petitioner's inculpatory statements, in that the State failed to call all material witnesses present during Petitioner's interrogations, and that Petitioner's inculpatory statements were induced by coercion violence and threats of harm.

REASONS FOR GRANTING THE WRIT

QUESTION I

The effects of marijuana use on both the individual and society is a topic of national concern. Numerous executive and legislative commissions have studied the effects of marijuana use, and have compiled storehouses of empirical and sociological data. There is great confusion in the public's mind over marijuana use, with misinformation being disseminated on both sides of the issue.

Arkansas' marijuana statute, Ark. Stat. Ann. §82-2614 et seq., is essentially a uniform state law which has been adopted by many states throughout the country. Statewide criminal penalties for marijuana use, must be both rational and reasonable. Above all, the statutes must be founded on a proper declaration of legislative facts.

Arkansas' marijuana statute as written, is unconstitutional. If marijuana remains impermissibly classified, contemporary society will become further polarized. The fundamental questions of marijuana classification must be answered.

Petitioner challenged the constitutionality of Arkansas' Controlled Substances Act as it applied to marijuana Petitioner presented clear, cogent and authoritative evidence that marijuana did not fit within any of the statutory criteria which define a Schedule VI substance. The statute on its face, therefore, is erroneous. Petitioner presented further proof, equally convincing, that Arkansas' marijuana statute was arbitrary and capricious.

The issue thus becomes, whether marijuana may be constitutionally classified as a Schedule VI controlled

substance under the criteria of Ark. Stat. Ann. §82-2614.2. The standard of review in addressing this challenge to the aforementioned legislative provision, is the "rational relationship" test, wherein a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973).

An act of the Legislature carries a presumption of validity, and will be upheld unless demonstrated to be irrational. *South Carolina Highway Department v. Barnwell Brothers,* 303 U.S. 177, 191 (1938). Nevertheless, that a legislative declaration of facts appears to be reasonable when enacted, does not insulate the statute from judicial review. See, *Chastleton Corporation v. Sinclair,* 264 U.S. 543, 547-48 (1924); *Abie State Bank v. Bryan,* 282 U.S. 765, 772 (1931); *Block v. Hirsh,* 256 U.S. 135, 154 (1921); *United States v. Carolene Products Company,* 304 U.S. 144, 153 (1938). The Court has recognized that "regulations under the police power, although valid or presumed valid when made, may become arbitrary and irrational in the light of later events." *Chastleton Corporation v. Sinclair,* 264 U.S. 543, 547-48 (1924). Moreover, the Court is "not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." *Id.* at 547.

While arbitrariness and irrationality may not be evident from the literal words of the statute, such arbitrariness and irrationality may be "demonstrated" by scientific or other empirical evidence. The Supreme Court reaffirmed this principle in *Leary v. United States,* 395 U.S. 6, (1969). There the Court was presented with a challenge to 21 U.S.C. §176a, which provided that persons who

possessed marijuana in the United States would be presumed to know that the marijuana had been illegally imported. After surveying a mass of reports, studies and articles by experts on the cultivation, importation and distribution of marijuana, the Court concluded that it should not be said that "at least a majority of marijuana possessors have learned of the foreign origin of marijuana" *Id.* at 52. Accordingly, the Court struck down the presumption as invalid in light of the empirical data. The Court expressly stated:

> A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration. *Id.* at 38.

When such evidence is presented, the Court must take it into account in determining the validity of the challenged legislation. When such evidence is overwhelming, the Court may not rely on a presumption of "reasonableness" to sustain the legislation.

A highlight of the arbitrary, capricious and erroneous classification of marijuana in Arkansas' Controlled Substances Act is as follows:

(a) THE SUBSTANCE IS NOT CURRENTLY ACCEPTED FOR MEDICAL USE IN TREATMENT IN THE UNITED STATES.

There are indeed certain medical uses for marijuana. In fact, the value of marijuana in medical treatment has been recognized for more than four thousand years. (The report of the Canadian Commission of Inquiry into the

Non-Medical Use of Drugs, entitled "Cannabis" (1972)). Recent studies have reported usefulness in the treatment of high blood pressure, Grinspoon, *Marihuana Reconsidered* (1971); glaucoma, Helper and Frank, *Marihuana Smoking and Intraocular Pressure,* 217 J. Amer. Med. Assoc. 1391 (1971); and asthma, Tashkin, et al, *Acute Pulmonary Psychologic Effects of Smoked Marijuana and Oral-Tetra Hydrocannabinol in Healthy Young Men,* 289 New Eng. J. Med. 336 (Aug. 16, 1973).

Studies at UCLA and other research centers have evaluated marijuana's effects in alleviating various symptoms of cancer and side effects of treatment. Cohen, *A Progress Report, Marijuana As Medicine, Psychology Today,* (1978).

Dr. Herbert Modlin, who testified at Petitioner's pretrial hearing to dismiss the information, stated there were some hundreds of articles and literature on the uses of marijuana for a variety of things (R. 189).

(b) THAT THERE IS LACK OF ACCEPTED SAFETY FOR USE OF THE DRUG OR OTHER SUBSTANCE EVEN UNDER DIRECT MEDICAL SUPERVISION.

Again, the evidence is overwhelming that there is no lack of safety for the use of the drug, especially under direct medical supervision. Recent studies indicate that the use of marijuana is far from unsafe. The encyclopedic work of Dr. Lester Grinspoon, *Marihuana Reconsidered,* 1971, *supra,* was at the time it was written, the most comprehensive survey and analysis on the use and effects of marijuana available. Drawing upon hundreds of studies, as well as his own research, Grinspoon documented the conclusions

reached by earlier researchers: moderate use of marijuana causes no physical or psychological harm to users, *Id.* at 370-371; marijuana is not addictive, *Id.* at 223; has never been shown to have caused death of any user, *Id.* at 227; and does not produce psychosis, *Id.* at 253. Furthermore, marijuana *can* be used, and is being used, in some states now, under direct medical supervision.

(c) THAT THE SUBSTANCE HAS RELATIVELY HIGH PSYCHOLOGICAL AND/OR PHYSIOLOGICAL DEPENDENCE LIABILITY.

In *People v. McCabe,* 49 Ill. 2d 338, 275 NE 2d 407 (1971), the Court compared the effect of marijuana with those of narcotic and other dangerous drugs and concluded:

> "Observations to be drawn on marijuana are that it is not a narcotic and is not truly addictive. Its use does not involve tolerance, physical dependence or the withdrawal syndrome."

In *People v. Sinclair,* 387 Mich. 91, 194 NW2d 878, 881 (1972), the Court stated:

> "Comparison of the effects of marijuana use on both the individual and society with the effects of other drug use demonstrates not only that there is not rational basis for classifying marijuana with the 'hard narcotics' but, also, that *there is not even a rational basis for treating marijuana as a more dangerous drug than alcohol.*" (Emphasis added).

(d) THAT USE OF THE SUBSTANCE PRESENTS A DEFINITE RISK TO PUBLIC HEALTH.

Medical evidence clearly shows a contrary finding. In *Ravin v. State,* 537 P.2d 494 (Alaska 1975), the Court stated:

> "It appears that the use of marijuana, as it is presently used in the United States today, does not constitute a public health problem of any significant dimensions. It is, for instance, far less innocuous in terms of physiological and social damage than alcohol or tobacco."

In *State v. Anonymous,* 32 Conn. Supp. 324, 355 A.2d 729, 736 (1976), the Court concluded that "the overwhelming evidence presented to this Court indicates that experimental intermittent and moderate use of marijuana carries minimal risk to public health and 'neither the marijuana user nor the drug itself can be said to constitute a danger to public safety.' " In the *Jaffe Report,* supra, a summary of the effects of marijuana use in the standard medical text or pharmacology reports that "there seems to be a growing agreement within the medical community, at least, that marijuana does not directly cause criminal behavior, juvenile delinquency, sexual excitement, or lead inevitably to the use of other drugs." The empirical data discussed demonstrate that marijuana imposes little or no danger either to the individual or society.

CLASSIFICATION OF MARIJUANA AS ARBITRARY AND CAPRICIOUS

The criminal penalty for possession of marijuana with the intent to deliver under the Controlled Substances Act is a Class C Felony. Ark. Stat. Ann. §82-2217(1)(iii). This classification includes marijuana with those substances classified in Schedules IV and V in terms of criminal penalties, *Id.* Under the aforementioned arguments in this section, it has been conclusively demonstrated that as a drug, marijuana is a relatively harmless substance. Classify-

ing marijuana with the severe and potentially harmful drugs in Schedules IV and V, for the purpose of imposing punishment is arbitrary, capricious and irrational and therefore denies the appellant due process of law and equal protection of the laws.

The Shafer Commission Report (Report of the National Commission on Marijuana and Drug Abuse, March, 1972) indicates that many of the drugs in Schedule IV are more harmful than marijuana. Thus chloral betaine, chloral hydrate, etchlorvynol, ehtinamate and others in that Schedule:

> ". . . have been shown to be capable of producing barbituate-like intoxication and inducing tolerance, dependence, and an abstinence syndrome strikingly similar to that seen with alcohol and the barbituates. . . . Excessive doses cause varying degrees of drowsiness, confusion and motor incoordination with slurred or thick speech, double vision, staggering and falling."

The statutory scheme which imposes harsh criminal penalties for marijuana, a relatively harmless drug, equal with drugs that pose substantial danger to the user and society, denies the appellant the constitutional guarantee of equal protection of the laws.

An equal protection violation also exists in that Ark. Stat. Ann. §82-2602(e) of the Controlled Substances Act specifically excluded alcohol and tobacco. The psychological and physiological effects of the use of alcohol have long been neglected or ignored. Alcohol operates in the body as a central nervous system depressant; and its effects are very similar to those produced by barbituates; *Jaffe, supra,*

at 289. What is called "alcoholism" is actually physical addiction to the drug alcohol. J. Fort, *Alcohol: Our Biggest Drug Problem,* 197 (1973).

Tobacco ranks with alcohol in widespread use among Americans; it is also the single major cause of heart and blood vessel disorders, and cancer, which are the two most common causes of death in America accounting for more than half of the deaths in Americans each year, *Id.* at 197.

Dr. Modlin testified that from a physiological standpoint with regard to withdrawal symptoms, marijuana is a safer drug than tobacco (R. 187). As mentioned earlier, Dr. Modlin testified that marijuana was not even in the same class as a public health hazard as either alcohol or tobacco (R. 189). Dr. Modlin testified that the effects of alcohol are considerably more serious than the effect of marijuana (R. 202).

QUESTION II

Petitioner urges that his inculpatory statements were involuntary and therefore inadmissible. The test of admissibility is whether a confession is free and voluntary and not extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489 (1964).

A confession obtained under duress or coercion based upon the surrounding facts and circumstances is involuntary and constitutionally inadmissible against its maker. See, *Culonbe v. Connecticut,* 367 U.S. 568, 81 S. Ct. 1860 (1961). In the case at bar, Petitioner testified that he was beaten, threatened and coerced by law enforcement officers prior to leaving the arrest site (R. 289). Petitioner was arrested

approximately 3:00 a.m. on August 1, 1977, and did not give a formal confession until approximately 4:32 p.m. that afternoon (R. 240). One alleged inculpatory statement made by Petitioner took place immediately after Petitioner was subjected to abuse at the arrest site (R. 496). Petitioner testified that he did not sleep any the night prior to his arrest and was not allowed to sleep prior to his formal confession to state agents (R. 296, 297).

Petitioner further urges that the State's failure to call all material witnesses relative to the events preceding the inculpatory statements, amounts to a constitutional violation of Petitioner's rights under the due process clause of the Fourteenth Amendment.

The requirement of the State to produce all material witnesses surrounding an accused's confession was set forth in *Smith v. State,* 256 Ark. 67, 505 SW2d 504, 506 (1974), wherein the Court stated:

> "We hold that whenever the accused offers testimony that his confession was induced by violence, threats, coercion or offers of reward, then the burden is upon the State to produce all material witnesses who are connected with the controverted confession or give adequate explanation for their absence."

Petitioner testified that threats, coercion, and abuse were inflicted upon him at the arrest scene. In the instant case, Doug Rogers was present when Petitioner claimed the acts of coercion and physical violence occurred. If a police officer is present during the time of alleged threats or acts of physical violence, he is a material witness. The Arkansas Supreme Court misapplied the holding in *People*

v. Simms, 21 Ill. 2d 425, 173 NE2d 494 (1961), *cert. den.* U.S. 861 (1962) in affirming the trial court's ruling on the inculpatory statements.

CONCLUSION

Petitioner contends that Arkansas' Controlled Substances Act applicable to marijuana is unconstitutional and violative of the guarantee of a fair trial implicit in the Fourteenth Amendment. Petitioner further contends that he was denied a fair trial implicit in the Fourteenth Amendment by the introduction of Petitioner's inculpatory statements, where the State failed to call all material witnesses present during Petitioner's interrogations and further that such inculpatory statements were induced by coercion, violence and threats of harm.

Respectfully submitted,

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Appendix

APPENDIX "A"

IN BANC

SUPREME COURT OF ARKANSAS

ROBERT BUSHONG ..... *Appellant*

vs. No. CR 79-161

STATE OF ARKANSAS ..... *Appellee*

Opinion Delivered: November 13, 1979

Appeal from Izard Circuit Court

Leroy Blankenship, Circuit Judge, affirmed

DARRELL HICKMAN, *Associate Justice*

Robert Bushong, the appellant, was convicted of possession of marijuana with the intent to deliver it and sentenced to five years imprisonment and fined $5,000.00.

Bushong was charged in Fulton County, Arkansas, but tried in Izard County, the court having granted a motion for change of venue.

Bushong alleges four errors: First, there is a threefold attack on his prosecution under Arkansas' Controlled Substances Act. Bushong alleges the Act amounts to an invalid delegation of legislative authority; that the Commissioner of Narcotic and Toxic Substances has failed to comply with the Controlled Substances Act and the Administrative Procedure Act; and that the Controlled Substances Act is unconstitutional because it is arbitrary, capricious and unreasonable. Second, the State failed to

call a material witness who was present during the appellant's interrogation. Third, the court failed to suppress Bushong's statements which, allegedly, were induced by coercion, violence and threats. Fourth, the court erred in admitting an oral statement made by the appellant to Trooper Bob Reynolds.

We find no merit to any of these arguments and affirm the judgment of the trial court.

The appellant put on extensive proof that the Commissioner of Narcotic and Toxic Substances had failed "to revise and republish" the schedules in the Controlled Substances Act as required by Ark. Stat. Ann. §82-2614.3 (Repl. 1976).

Also, the appellant put on evidence that the Commissioner had not complied with the Administrative Procedure Act. This argument relates to a requirement that certain information be filed with the Secretary of State and the clerks of the various circuit courts throughout the State. See Ark. Stat. Ann. §5703(d) (Repl. 1976).

Finally, the argument is made that marijuana does not belong in the classification in which it was placed, is not a harmful substance that should be in the Controlled Substances Act, and, therefore, is unconstitutionally controlled.

Because the appellant was prosecuted under a part of the Controlled Substances Act which has not been changed since it was enacted by the General Assembly, the appellant is in no position to argue that he was aggrieved by any failure on the Commissioner's behalf to strictly follow the Administrative Procedure Act. That failure to act would be poor administration, not a defense in this case. For the

same reason, the appellant has no standing to attack the Commissioner's authority as an unlawful delegation of legislative authority. *United States v. Westlake,* 480 F.2d 1225 (5th Cir. 1973). Neither do we believe that the Commissioner's failure to revise and republish the schedules of controlled substances, at least where no allegation of the lack of actual notice was made, can be used as a defense to a criminal prosecution under a part of the Act as passed by the General Assembly. Compare *Central Arkansas Auction Sale, Inc. v. Bergland,* 570 F.2d 724 (8th Cir. 1978).

The fact that the appellant offered some evidence that marijuana does not belong in Schedule 6 does not mean the General Assembly was wrong in its classification of marijuana. Such legislation is presumed to be constitutional, *State v. Baker,* 56 Haw. 272, 535 P.2d 1934 (1975), and will be upheld if supported by any reasonable basis. *Pridgeon v. State,* 266 Ark. 651, —— SW2d —— (1979).

While the appellant offered testimony that marijuana was not as harmful as alcohol or tobacco, we cannot say that the evidence presented by the appellant is so overwhelming and uncontradicted as to convince us that the legislative act in question is arbitrary, capricious and unreasonable, and, therefore, violates the due process clause and the equal protection clause of the United States Constitution. See *People v. Stark,* 400 P.2d 923 (1965).

A pre-trial hearing was held, as required by *Jackson v. Denno,* 378 U.S. 368 (1964), to determine if Bushong's statements were voluntary. He admitted to the police officers it was his marijuana. Bushong testified that he was threatened, coerced, and intimidated by police officers for several hours before he finally made a statement to two Arkansas State Policemen in Salem about 4:30 p.m. on the

date he was arrested. Such an in-custody confession is presumed to be involuntary and the burden is on the State to show that the statement was voluntarily made. *Smith v. State,* 254 Ark. 538, 494 SW2d 489 (1973). We make an independent determination of voluntariness of a confession based upon the totality of the circumstances. However, we do not overturn the finds of the trial court unless they are clearly against the preponderance of the evidence. *Degler v. State,* 257 Ark. 388, 517 SW2d 515 (1974).

In *Smith v. State, supra,* we adopted the rule that whenever an accused offers testimony that his confession was induced by violence, threats, coercion or offers of reward, then the State has a burden to produce all material witnesses who were connected with the controverted confession or give adequate explanation of their absence.

Seven police officers were called to testify at the *Denno* hearing regarding the voluntariness of Bushong's statements. The State did not call a possible witness, Doug Rogers, who was a constable. The appellant objected to the State's failure to call Rogers as a material witness and the State offered no explanation of his absence. The question presented to us is, was Doug Rogers a material witness connected with the confession; should he have been called by the State or his absence explained?

In *Smith v. State, supra,* an Arkansas State Policeman who was accused by the defendant of coercing him and providing him leniency was not called as a witness. Neither was the stenographer called who took down the defendant's statement and who was present during his interrogation. We held these persons were material witnesses. In the case of *Smith v. State,* 256 Ark. 67, 505 SW2d 504 (1974), the State did not call one of two police officers who interrogated

the defendant. There was evidence the confession was induced by violence, threats and coercion. Both police officers were accused of physically abusing the defendant. We held the absent police officer was a material witness. That officer signed the statement as a witness and was present when the defendant made his statement.

In *Northern v. State,* 257 Ark. 549, 518 SW2d 482 (1975), one of two police officers was not called by the State. An allegation was made by the defendant that he was physically abused by the absent officer. The State's explanation of the officer's absence was not satisfactory and we reversed the judgment. In *Gammel & Spann v. State,* 259 Ark. 96, 531 SW2d 474 (1976), the State failed to call a witness who was in jail with the defendant. The argument was made that the cell mate, as well as police officers or jailers who placed the witness in the cell, could shed some light on the defendant's argument of an involuntary statement. We refused to extend the *Smith v. State,* 254 Ark. 538, 494 SW2d 489 (1973) decision beyond its specific language.

It is no excuse that a defendant fails to call the material witnesses. That burden is clearly upon the State. *Northern v. State, supra.*

The Illinois Supreme Court has had extensive experience with this rule. In the case of *People v. Simms,* 21 Ill. 2d 425, 173 NE2d 494 (1961), *cert. den.* 369 U.S. 861 (1962), that Court reviewed its previous decisions and discussed the application of the rule.

Illinois had substantially the same rule that we adopted in the *Smith* case. However, through the years they used different language in describing the rule. For example, wit-

nesses that were required to be called by the state were described as "All the Police Department men engaged or present at the sweating," "all the persons who had control over the defendant and are allegedly involved in the use of coercion," and "every police officer and every other person connected with taking the confession."

The Illinois court in *Simms* reviewed its rule and discussed in detail its decisions. In one case where a defendant was grilled constantly over an extended period of time, the State called only one police officer whose testimony covered only one-tenth of the period of time involved, and he did not specifically deny the alleged facts of the defendant. *People v. Holick*, 337 Ill. 333, 169 NE 269 (1929). In another case, a State's Attorney to whom the defendant complained concerning the tactics of the police was not called. *People v. Sloss,* 412 Ill. 61, 104 NE2d 807 (1952). These absent witnesses were determined to be material by the Illinois Court.

On the other hand, a State's Attorney who questioned the accused and took his confession was found not to be a material witness. The accused in that case said he was promised leniency. However, those promises were not made by the State's Attorney but by a sheriff and his deputy at a time when the State's Attorney was not present. There was no claim that the State's Attorney made any improper inducement or that the State's Attorney was present when it occurred. The State's Attorney was not declared a material witness. *People v. Scott,* 401 Ill. 80, 81 NE2d 426 (1948).

In another case, several witnesses who had been present at various stages of the interrogation process were not found to be material witnesses. The court concluded, "every

person who could be considered a material witness . . . was produced . . ." *People v. Jennings,* 11 Ill. 2d 610, 144 NE2d 612 (1957). It was found unnecessary to call some police officers who were present in the police station at the time of interrogation, but who did not participate in the questioning. *People v. Gavurnik* 2 Ill. 2d 190, 117 NE2d 782 (1954).

The Illinois Court concluded that its decisions were consistent and that the principle involved was the same. It said:

> The principle that emerges clearly from all these cases is that the persons who must be called as witnesses or whose absence must be explained are those persons whose testimony would be material on the issue of the voluntary nature of the confession. *People v. Simms,* 21 Ill. 2d 425, 432, 173 NE2d 425 (1961).

There is no doubt each case can differ in some respect and it becomes a question of applying the rule to facts in each case.

Bushong does not claim that any coercion or improper inducement occurred when he actually made the statement about 4:30 p.m. on the day he was arrested. That statement was taken by two Arkansas State Policemen, Officers Talley and Turner. It was not disputed that they properly advised Bushong of his rights and that he admitted to them that the marijuana was his. Bushong claims that the coercion occurred after he was arrested early on the morning of the 1st of August, 1977.

At about 3:00 a.m. on August 1st, Bushong and two others were surprised in the woods southwest of Mammoth Spring, Arkansas, by two officers, Bob Slayton and Ernie

Rose, deputy sheriffs of Fulton County. These two officers had a "stakeout" observing marijuana plants that were hung in trees to dry. Three other officers arrived shortly thereafter, Sheriff Barker, Trooper Martz and Constable Rogers. Bushong and the others were held at the scene until about 9:00 a.m.

Bushong testified that he was abused physically by Deputy Sheriff Slayton and Sheriff Barker. He said that Slayton grabbed his beard and struck him. He said Sheriff Barker observed this. At the time he was in a police vehicle. When asked if anyone else observed it, he said that Trooper Martz was sitting in his police car, immediately behind the car in which Bushong was sitting. He did not say any other witness observed this mistreatment. Bushong testified that he observed one of the other defendants being abused in the trooper's car by Sheriff Barker. He said that one of the other defendants was taken down the road by the sheriff and it sounded to him as if the sheriff beat that defendant.

Trooper Martz testified that he arrived shortly after the arrest and left about 9:00 a.m. During cross-examination he testified that Constable Rogers accompanied him to the scene and was there throughout this period of time and left with him. Bushong never testified that Constable Rogers observed any mistreatment of him, coerced him in any way or abused any of the other defendants in any way.

All of the police officers except the constable testified and denied the allegations of coercion and mistreatment. That is, six officers testified.

Was Rogers a material witness or was he a casual witness? We cannot conclude that he was a material witness.

If we decide that he was a material witness, then we might as well say all witnesses who could possibly have witnessed anything must be called by the State. That is an unreasonable burden to place upon the State. There must be some connection between the witness and the alleged acts of coercion or any opportunity to observe the alleged coercion. This record gives no indication that Rogers would have been a material witness in any regard except he happened to be present on the scene and might have observed something.

Bushong never mentioned Rogers in his testimony. One of the other defendants, who was called as a witness, did mention Rogers and it might be inferred from that witness' testimony that the constable, along with Martz and some others, harrassed that defendant. But that would require some speculation on our part. It is not alleged that all the police officers abused the suspects or that they were all in a position to observe each alleged act of abuse.

We conclude, therefore, that the trial court did not err in failing to require the State to produce Rogers, nor can we say that the trial court's decision regarding the voluntariness of the statements was clearly erroneous.

Trooper Bob Reynolds testified during the trial that Bushong made a statement to him when he was transporting Bushong from the woods to Mammoth Spring. It is argued that the admission of this statement was erroneous because it surprised the appellant. (The Prosecuting Attorney said he was surprised, too.) The appellant also argues a proper *Miranda* warning was not given and the trooper's testimony was totally inconsistent with what he had previously told the appellant's lawyer.

Reynolds testified during the *Denno* hearing and when asked if Bushong made any statements to him he replied "yes" but nobody asked him what the statements were. Later, before trial, the attorneys for Bushong took a statement from Reynolds which was recorded and in that statement Reynolds said "The man didn't tell me anything."

Reynolds testified that he gave the *Miranda* warning orally to Bushong when he got in the car. However, apparently he failed to tell Bushong that interrogation must cease if at any time during the questioning the defendant wished to remain silent.

Bushong did not deny that he was given his *Miranda* warning at the time he was arrested earlier that morning. The arresting officers said it was given. Reynolds testified that he knew that Bushong had been advised of his rights and, in fact, did not question Bushong, but Bushong simply voluntarily told him about the marijuana. Bushong's attorney was given the opportunity to introduce into evidence the transcript of the tape recording of Reynolds' statement and Reynolds admitted that he had made the statement that the man didn't tell him anything. He explained during redirect examination that he did not have his notes when he was examined by the lawyer.

The appellant argues that a continuance should have been granted so that the appellant's attorney could get the tape recording of Reynolds' statement to impeach Reynolds' testimony.

A hearing was held on the voluntariness of the statement and the court concluded that it was voluntary. Nobody asked Reynolds what the statement was. There is no requirement that the *Denno* hearing must involve the

details of the statement, only its voluntariness, with ample opportunity for the defense to test the burden of the State. See *Jackson v. Denno, supra; Silliman v. People,* 114 Colo. 130, 162 P.2d 793 (1945). The trial court found that Bushong was properly warned of his rights and that the statement he made to Reynolds was admissible. The trial court granted Bushong's attorney a full opportunity to impeach Reynolds' testimony and a continuance to obtain the tape would not have materially aided the defense. We cannot say the trial court's findings were clearly erroneous.

APPENDIX "B"

IN THE
SUPREME COURT OF ARKANSAS

ROBERT BUSHONG ..... *Appellant*

vs. No. CR 79-161

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM
IZARD COUNTY CIRCUIT COURT
PETITION FOR REHEARING

I.

THE COURT ERRED IN FAILING TO DISMISS THE INFORMATION CHARGING DEFENDANT WITH POSSESSION OF MARIJUANA WITH INTENT TO DELIVER ON THE FOLLOWING GROUNDS:

A. The failure of the Commissioner of Narcotic and Toxic Substances to comply with the requirements of the Controlled Substances Act, Ark. Stat. Ann. §82-2601 et seq. (Repl. 1976) and the Administrative Procedure Act, Ark. Stats. Ann. §§5-701 — 5-714 (Repl. 1976) rendered the criminal penalities with regard to marijuana invalid.

The decision of this Court handed down November 13, 1979, states that the failure of the Commissioner to strictly follow the Administrative Procedure Act amounted to poor administration and did not amount to a defense in this case.

The Court misinterpreted the effect of the Administrative Procedure Act on administrative rules such as the controlled substances schedules herein in issue. The failure to comply with the Administrative Procedure Act renders an administrative rule invalid.

Ark. Stat. Ann. §5-703(e) specifically states, "No rule hereafter adopted shall be valid unless adopted and filed in substantial compliance with this Section 3." Appellant in his Brief in Chief clearly showed that the Commissioner of Narcotic and Toxic Substances did not come close to substantial compliance with the Administrative Procedure Act requirements. Such failure rendered the Controlled Substances schedules invalid and unenforceable as law for the year 1977. The legislature required that the Controlled Substances Act be controlled by the procedures of the Administrative Procedure Act. Ark. Stat. Ann. §82-2602(a). To now state that the Administrative Procedure Act requirements are not mandatory clearly contravenes legislative directive.

The Court further states that the Commissioner's failure to revise and republish the schedules of Controlled Substances is not a defense, at least where the lack of actual notice was made. Within his argument on that issue, Appellant challenged the Controlled Substances Act on two grounds. First, that the Commissioner of Narcotic and Toxic Substances failed to republish the schedules (*i.e.*, failed to give proper notice of its actions). Secondly, Appellant challenged the decision making process of the Commissioner of Narcotic and Toxic Substances in the revision of the controlled substances schedules.

The Court cites the case of *Central Arkansas Auction Sales, Inc. v. Bergland*, 570 F.2d 742 (8th Cir. 1978) to be

compared on the above issues of republication and revision. It is important to note the conclusion of that case at Page 731, on the comparable issue of the administrative decision making process. There the Court stated:

> We are convinced that the Secretary's findings are supported by the evidence and proper legal standards have been applied. See *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 413-16, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971); *Burlington Northern, Inc. v. United States,* 549 F.2d 83, 88-89 (8th Cir. 1977). We are also satisfied that substantial evidence on the record as a whole supports the administrative decision. See *Giles Lowery Stockyards, Inc. v. Department of Agriculture,* 565 F.2d 321, 326-27 (5th Cir. 1977).

Using that language as a standard of review for administrative rules, the schedules of controlled substances for the year 1977 must be declared invalid. The findings of the Commissioner of Narcotic and Toxic Substances with respect to marijuana for the year 1977 were not based on proper legal standards. Her findings relative to marijuana were based upon the improper notion that the legislature controlled marijuana and not the Commissioner of Narcotic and Toxic Substances. In essence, with regard to revision of marijuana, she not only failed to apply the proper legal standard, she applied no standard whatsoever since she erroneously thought it was not her duty to do so. (Appellant's brief page 95).

Furthermore, under the standard set forth in *Central Arkansas Auction Sales, Inc. v. Bergland, supra,* there is *no* evidence to support the Commissioner's controlled substances schedules revision, since she did not make a decision on *any* evidence her agency had gathered. (Appellant's brief, page 95). The record on the whole does not support the administrative decision.

> C. The Controlled Substances Act under which the Defendant was charged was unconstitutional in that it was arbitrary, capricious and erroneous, and therefore denied the defendant due process of law and equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

The Court is in error when it states that Appellant's evidence that marijuana does not belong in Schedule 6, applies to the General Assembly's decision to place marijuana in Schedule 6. The General Assembly placed marijuana in Schedule 6 in 1973 when it enacted Ark. Stat. Ann. §82-2614. Since that date, the classification of marijuana has been strictly under the control of the Commissioner of Narcotic and Toxic Substances, Ark. Stat. Ann. §82-2601. Appellant introduced clear, cogent and overwhelming evidence through expert testimony, that for the year 1977, marijuana did not fit any of the four criteria for Schedule 6, contained in Ark. Stat. Ann. §82-2614.1. Appellant's evidence challenged the decision making process of the Commissioner, not the General Assembly.

II.

THE COURT ERRED IN FAILING TO SUPPRESS DEFENDANT'S INCULPATORY STATEMENTS IN THAT THE STATE FAILED TO CALL ALL MATERIAL WITNESSES PRESENT DURING DEFENDANT'S INTERROGATION.

This Court discusses the persuasive case of *People v. Simms,* 21 Ill. 2d 425, 173 NE2d 494 (1961), *cert. den.* 369

U.S. 861 (1962), in the application of the rule that the State must call all material witnesses to a confession by an accused. Under the facts in the case at bar, the Court misapplied the rule of law set out in *People v. Simms*. In *Simms, Id.* at page 432, the Illinois Court states the proposition that the persons who must be called as witnesses or whose absence must be explained are those persons whose testimony would be material on the issue of the voluntary nature of the confession.

The holding in *Simms,* clearly stands for the proposition that a police officer who is present when threats or physical abuse is alleged to have been applied against an accused, is a "material" witness. On that particular issue, the Court in *Simms* found ample authority for the rule. In *People v. Arendarczyk*, 367 Ill. 534, 12 NE2d 2, the State called only one witness, despite the fact that others were present at the time of the alleged coercion. In *People v. Spranger,* 314 Ill. 602, 145 NE 706, one of the police officers present at the time of the alleged threats was not called and in *People v. Sweeny,* 304 Ill. 502, 136 NE 687, there was a failure to call some officers who were charged with brutality or who were present at the time of the alleged brutality. The Court in *Simms,* at pages 496 and 497, held that each of the above cited cases involved a failure to produce one or more witnesses whose testimony would have been material to the issue of the voluntary nature of the confession.

In the instant case, Doug Rogers *was present* when Appellant claimed the acts of coercion and physical violence occurred. The rule of law set forth in *Simms* and in Arkansas case law, is both clearly defined and applicable to the case at bar. If a police officer is present during the time of alleged threats or acts of physical violence, he is a material

witness. The Court misapplied the holding in *Simms* and other Arkansas cases in point in affirming the trial court's ruling.

CONCLUSION

Appellant states that the Court misinterpreted the application of the statutory requirements of the Controlled Substances Act and the Administrative Procedure Act. Appellant argues that the Court should re-examine both the conduct of the Commissioner of Narcotic and Toxic Substances and the empirical evidence relative to the scheduling of marijuana as a Schedule 6 controlled substance.

The failure to call Doug Rogers was error, and to so hold, would not extend the rule of law this State has established on the issue of calling all material witnesses connected with a controverted confession. The appellant respectfully submits that this case should be reversed.

Respectfully submitted,

McDaniel & Gott, P.A.
Attorneys at Law
400 South Main
Second Floor
Jonesboro, Arkansas 72401

By: Phillip Wells

Attorney for Robert Bushong

APPENDIX "C"

STATE OF ARKANSAS
IN THE SUPREME COURT

BE IT REMEMBERED, that at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A.D. 1979, amongst others were the following proceedings, to-wit:

On the 17th day of December, A.D., 1979, a day of said term

ROBERT BUSHONG, *Appellant* No. CR 79-161 STATE OF ARKANSAS, *Appellee*	Appeal from Izard Circuit Court Criminal District Rehearing denied.

IN TESTIMONY, that the above is a true copy of the Order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 25th day of February, A.D., 1980.

/s/ Jimmy H. Hawkins, Clerk
By: /s/ Bruce H. Bokony, D.C.

APPENDIX "D"

STATE OF ARKANSAS
IN THE SUPREME COURT

BE IT REMEMBERED, that at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the first Monday of October, A.D., 1979, amongst others were the following proceedings, to-wit:

On the 28th day of January, A.D., 1980, a day of said term

ROBERT BUSHONG, *Appellant* No. CR 79-161 STATE OF ARKANSAS, *Appellee*	Appeal from Izard County Circuit Court Criminal District

Appellant's Motion to Recall Mandate is granted.

IN TESTIMONY, that the above is a true copy of the Order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 25th day of February, A.D., 1980.

/s/ Jimmy H. Hawkins, Clerk
By: /s/ Bruce H. Bokony, D.C.